A

MALAYAN BANKING BHD

v.

CHING SUIT FEE (TRADING AS PRIME INDEX ENTERPRISE)

B

COURT OF APPEAL, PUTRAJAYA
SULAIMAN DAUD JCA
T SELVENTHIRANATHAN JCA
ABDUL WAHAB PATAIL JCA
C [CIVIL APPEAL NO: W-02-719-2005]
3 AUGUST 2010

BANKING: *Banks and banking business - Letter of Credit - Sale of goods - Alleged discrepancies in documents - Issuing bank demanding*
D *refund on grounds of alleged irregularities after endorsing payment to seller - Demand accommodated by seller's bank who deducted sum from seller's account - Whether deduction wrongful - Whether seller's bank liable to refund deducted sum to seller - Contracts Act 1950 s. 73 - Payment made under mistake - Applicability*

E

CIVIL PROCEDURE: *Estoppel - Banks and banking business - Letter of Credit - Sale of goods - Issuing bank demanding refund on grounds of alleged irregularities in documents after endorsing payment to seller - Whether estoppel applied*

F The respondent in this case is the sole proprietor of a firm which sold certain goods, payable by Letter of Credit ('LC'), to a buyer in Taipeh. Having obtained the LC, the respondent's firm approached its bank, the appellant, for service to collect payment. The appellant submitted the LC documents to the issuing bank in
G Taipeh, and subsequently received payment, which was remitted to it by the Hong Kong and Shanghai Bank in Kuala Lumpur, acting as the reimbursing bank (for the issuing bank). The proceeds was then duly credited to the respondent's bank account. However, having released the payment, the reimbursing bank later demanded
H for its refund on the ground that there were discrepancies in the documents forwarded by the appellant. The appellant obliged (*albeit* hesitantly) and consequently refunded a sum of RM1,726 to the reimbursing bank/issuing bank, and further deducted that amount from the respondent's bank account. The respondent averred that
I the deduction as made was wrong and unlawful, and successfully

prosecuted a claim against the appellant in the High Court for the recovery of the sum. The appellant appealed and before the learned justices of appeal, the following primary issues had arisen for determination, namely: (i) whether the issuing bank was on the facts and in the circumstances estopped from demanding the return of the payment; and (ii) whether the appellant was in any case liable to refund the sum deducted.

Held (dismissing appeal and affirming the High Court)
Per Abdul Wahab Patail JCA delivering the judgment of the court:

(1) A Letter of Credit may be described as an instrument issued by an issuing bank at the request of its buyer customer whereby the bank promises to pay the seller beneficiary provided the latter presents the documents called for, exactly as stipulated in the LC and meet all the other terms and conditions set out in the LC. The first principle of an LC is thus it is documentary. (para 11)

(2) The complaint of defects in documents and demand for refund was made by the issuing bank after the documents had been accepted and payment made to the beneficiary of the LC. Assuming there were indeed defects in the documents submitted for the respondent, the release of payment was on account of the issuing bank's own decision to accept the defect, or an error. However, be it acceptance or error, it is internal to the issuing bank and involves neither the respondent nor the appellant. (para 17)

(3) Having accepted the documents and made payment, without reservations, the issuing bank is estopped from demanding the return of the payment made on the grounds of alleged defects. The respondent is not obliged to refund to the issuing bank or the reimbursing bank whose problem would arise if, and only if the buyer refuses to pay the issuing bank, or the issuing bank disputes with its reimbursing bank. The parties in such an action are the issuing bank against a negotiating bank, an advising bank and the applicant for the LC. (para 18)

(4) For an issuing bank to be able to reverse its position after acceptance of the claim and the completion of the process of payment under an LC would defeat the goals of certainty,

promptness and finality of payment which letters of credit serve to provide to sellers in the context of an international trading system with minimal cross-border litigation. (para 19)

(5) The appellant in this case had acted as the respondent's bank, and not a mere negotiating bank. The fact the appellant took the respondent's documents to the issuing bank to seek payment for the respondent does not metamorphose it into a "negotiating bank". It was a bank which accepts the documents for examination and, if these are found in order, credit the due amount to the beneficiary. It has no authority to conduct any negotiation. In the circumstances, the appellant erred in acting on its own to refund to the issuing bank and then to debit the respondent's account, without being specifically authorized to do so by the respondent. The appellant cannot make the respondent bear the burden of its own error. (paras 20-21)

(6) Recovery of monies paid under a mistake under s. 73 of the Contracts Act 1950 is a matter that can be raised by the issuing bank against the respondent and appellant. The factual basis to such right has to be established by the issuing bank, which the appellant might choose not to dispute if it bears the cost itself, but is not entitled to do so without prior notice of the respondent if the appellant intends to pass the cost of it to the latter. Where it fails to do so it runs the risk of an action as in this case. (para 26)

Bahasa Malaysia *Translation Of Headnotes*

Responden dalam kes ini adalah pemilik tunggal sebuah firma yang menjual barangan, yang dibayar melalui Surat Kredit ('SK'), kepada pembeli di Taipeh. Setelah memperoleh SK, firma responden berjumpa dengan banknya, iaitu perayu, memohon perkhidmatan untuk mendapatkan bayaran. Perayu menghantar dokumen-dokumen SK kepada bank pengeluar di Taipeh, dan berikutnya telah menerima bayaran yang dibuat kepadanya oleh Hong Kong and Shanghai Bank di Kuala Lumpur, yang bertindak sebagai bank pembayar (bagi pihak bank pengeluar). Bayaran kemudian telah dikreditkan ke akaun bank responden. Walau bagaimanapun, bank pembayar, setelah membuat pembayaran, telah menuntut supaya bayaran dikembalikan atas alasan bahawa terdapat beberapa percanggahan pada dokumen yang dihantarserah oleh perayu.

Permintaan tersebut telah dipatuhi oleh perayu (walaupun teragak-agak), dan ianya berkesudahan dengan perayu mengembalikan sejumlah RM1,726 kepada bank pembayar/bank pengeluar dan seterusnya memotong jumlah tersebut dari akaun bank responden. Responden berhujah bahawa pemotongan yang dibuat adalah salah dan tak sah dan di Mahkamah Tinggi telah berjaya mendapat perintah supaya wang tersebut dikembalikan kepadanya. Perayu merayu dan di hadapan yang arif hakim-hakim rayuan, persoalan-persoalan penting berikut telah berbangkit untuk pemutusan, iaitu: (i) sama ada berdasarkan halkeadaan dan fakta yang wujud bank pengeluar telah diestop dari menuntut pembayaran balik bayaran; dan walau apapun, sama ada perayu bertanggungan untuk mengembalikan jumlah yang dipotong.

Diputuskan (menolak rayuan dan mengesahkan Mahkamah Tinggi)
Oleh Abdul Wahab Patail JCA menyampaikan penghakiman mahkamah:

(1) Suatu Surat Kredit bolehlah diperihalkan sebagai suatu instrumen yang dikeluarkan oleh bank pengeluar atas permintaan pelanggan pembelinya di mana bank berjanji untuk membayar penjual benefisiari dengan syarat pihak terkemudian mengemukakan dokumen-dokumen yang perlu, seperti yang tercatit di dalam SK dan yang memenuhi segala terma dan syarat yang terdapat di dalam SK. Prinsip pertama suatu SK adalah ianya berbentuk dokumen.

(2) Rungutan mengenai kecacatan pada dokumen dan tuntutan pengembalian dibuat oleh bank pengeluar selepas dokumen-dokumen telah diterima dan bayaran dibuat olehnya kepada benefisiari SK. Diandaikan memang terdapat kecacatan pada dokumen yang dihantarserah bagi pihak responden, pelepasan bayaran adalah disebabkan keputusan bank pengeluar sendiri untuk menerima kecacatan, ataupun satu kesilapan. Bagaimanapun, sama ada ianya penerimaan atau kesilapan, ia adalah perkara dalaman bank pengeluar dan tidak melibatkan responden mahupun perayu.

(3) Setelah menerima dokumen dan membuat bayaran, tanpa apa-apa syarat, bank pengeluar adalah diestop dari menuntut pengembalian bayaran atas alasan kecacatan yang didakwakan tersebut. Responden tidak bertanggungan untuk mengembalikan kepada bank pengeluar atau bank pembayar, di mana masalah

A mereka akan hanya berbangkit jika pembeli enggan membayar bank pengeluar atau bank pengeluar tersebut mempertikaikan bank pembayar. Dalam tindakan sedemikian, pihak-pihaknya adalah di antara bank pengeluar dengan bank perunding, bank penasihat dan pemohon SK.

B

(4) Membolehkan bank pengeluar untuk memundurkan kedudukannya selepas menerima tuntutan dan selepas sempurnanya proses pembayaran di bawah SK akan menjejaskan matlamat kepastian, kesegeraan dan kemuktamadan bayaran yang ingin diberikan oleh sesuatu surat kredit kepada penjual-penjual dalam konteks sistem penjualan antarabangsa dengan litigasi antara sempadan yang minima.

C

(5) Perayu dalam kes ini telah bertindak sebagai bank responden, dan bukan semata-mata sebagai bank perunding. Fakta bahawa perayu telah mengemukakan dokumen-dokumen responden kepada bank pengeluar untuk mendapatkan bayaran untuk responden tidak menukarnya kepada sebuah "bank perunding". Ia adalah bank yang menerima dokumen-dokumen untuk disemak dan, jika semuanya teratur, mengkreditkan jumlah yang terhak tersebut kepada benefisiari. Ia tidak mempunyai sebarang autoriti untuk berunding. Oleh itu, perayu telah silap apabila bertindak secara bersendirian mengembalikan bayaran kepada bank pengeluar dan kemudian menolaknya dari akaun responden, tanpa diberi kuasa khusus oleh responden untuk berbuat demikian. Perayu tidak boleh memaksa responden untuk menanggung beban atas kesilapan yang dibuatnya sendiri.

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(6) Pengembalian wang yang dibayar atas kesilapan di bawah s. 73 Akta Kontrak 1950 adalah satu halperkara yang boleh dibangkitkan oleh bank pengeluar terhadap responden dan perayu. Asas fakta bagi hak tersebut hendaklah dibuktikan oleh bank pengeluar, yang mana boleh sahaja diterima oleh perayu jika ia bersedia untuk menanggung kosnya, tetapi tidak berhak untuk berbuat demikian tanpa notis terdahulu diberikan kepada responden jika perayu berhasrat untuk mengalihkan kos kepada pihak terkemudian. Di mana perayu gagal berbuat demikian, maka ia mengambil risiko untuk didakwa sepertimana yang berlaku dalam kes ini.

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Cases referred to:
Seaconsar (Far East) Ltd v. Bank Markazi Jomhouri Islami Iran [1999] 1 Lloyd's Rep 36 ***(refd)***
United Bank Ltd v. Banque Nationale De Paris & Ors [1991] 3 CLJ 2012; [1991] 4 CLJ (Rep) 1137 HC ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 73

For the appellant - GK Ganesan (SP Ong with him); M/s Abd Aziz Chen & Co
For the respondent - K Ganesan (V Mugunthan with him); M/s Indra Gandhi & Co

[Appeal from High Court, Kuala Lumpur; Civil Suit No: S1-22-548-1993]

Reported by Wan Sharif Wan Ahmad

JUDGMENT

Abdul Wahab Patail JCA:

[1] The defendant/appellant Malayan Banking Berhad (the appellant) appealed against the decision of the High Court to enter judgment for the plaintiff/respondent Ching Suit Fee (the respondent) to return certain sums into the respondent's bank account with the appellant bank.

Background

[2] The respondent is the sole proprietor of Prima Index Enterprise, a firm which sold certain goods to a buyer Mcmillan Enterprise Co Ltd in Taipeh. Payment was agreed to be by way of a letter of credit.

[3] As submitted for the appellant, having received the letter of credit, the plaintiff's firm went to the appellant, its bank, for service to collect payment. The respondent gave the relevant documents to the appellant.

[4] The appellant thereafter submitted the documents to the issuing bank, the Taipei Business Bank for payment. On 15 July 1993 the Hong Kong and Shanghai Bank in Kuala Lumpur acting as the reimbursing bank (the reimbursing bank) for the issuing bank, sought confirmation from the issuing bank to release payment. Having obtained confirmation from its principal the issuing bank, the reimbursing bank released payment to the appellant who credited the proceeds to the respondent's bank account.

[5] Two days later, the reimbursing bank informed the appellant there were discrepancies in the documents forwarded. It wanted its money back.

[6] Having ignored the reimbursing bank initially, the appellant replied on 18 August 1993 to decline to return the money on the grounds the issuing bank had received and had sight of the documents before making payment.

[7] But later the appellant refunded the payment with interest amounting to RM1,726, and demanded the sum from the respondent and deducted the amounts from the respondent's firm's account.

[8] The respondent commenced this action to recover the sum.

[9] The learned trial judge allowed the claim for the return of the sums into the respondent's account. The appellant appealed.

Letter Of Credit

[10] Although the respondent's claim was for the return of monies deducted from its banking account with the appellant bank, the latter's right to deduct the sum arises from whether it had an obligation to refund the payment it had collected under a letter of credit for the respondent.

[11] A letter of credit may be simply described as an instrument issued by an issuing bank at the request of its buyer customer whereby the bank promises to pay the seller beneficiary provided the latter presents the documents called for, exactly as stipulated in the letter of credit and meet all other terms and conditions set out in the letter of credit. The first principle of a letter of credit is that it is documentary. It addresses the problems of payment risk as well as of a party seeking to renege on a transaction on the basis of purported complaints, particularly in cross-border transactions. It replaces the buyer's credit-worthiness with the issuing bank's credit-worthiness and independence. For the purposes of a claim under the letter of credit, the basic documents comprise documents of title and other documents enabling the buyer to claim the goods.

[12] A letter of credit comes into being generally in the following manner. A buyer and a seller agree upon a sale and purchase with payment by letter of credit. The buyer completes an application to its bank to issue a letter of credit, hence the term "issuing bank",

in favour of the seller, the intended beneficiary of the letter of credit. The issuing bank may send a pro-forma letter of credit to a bank typically located in the seller's country which verifies the letter of credit for authenticity and forwards the pro-forma letter of credit to the seller, or it may simply send the pro-forma letter of credit directly to the seller.

[13] The seller examines the pro-forma letter of credit to ensure it corresponds with the terms of the agreement between it and the buyer and that the documents stipulated in the pro-forma letter of credit can be produced and the terms and conditions of the pro-forma letter of credit can be fulfilled. Amendments may become necessary. When all parties finally agree to such amendments as may be desired, the amendments are incorporated into the terms of the letter of credit to be issued.

[14] It is prudent practice not to ship goods until the letter of credit with the agreed amendments are received. The seller then ships the goods and prepares or obtains the documents specified in the letter of credit. He then makes demand by presenting the documents within the specified period and before the expiry of the letter of credit, to the bank with whom the funds are available and authorised in the letter of credit to effect payment.

Defects In Claim Documents

[15] The appellant's predicament in this case began when the issuing bank claimed that there were various defects in the documents.

[16] Ordinarily if there are defects in the documents, the issuing bank refuses to release payment. It is entitled to demand strict compliance to the terms of the letter of credit before the payment under the letter of credit is released. It is the issuing bank's prerogative to examine the documents as closely as it desires and where there are possible defects, to decide whether to accept or to reject the documents. Even if it were to reject the claim, it must under the Uniform Customs and Practice for Documentary Credits ICC No. 400, (1983) Art. 16 and 16(d) give notice promptly. See *Seaconsar (Far East) Ltd v. Bank Markazi Jomhouri Islami Iran* [1999] 1 Lloyd's Rep. 36. Otherwise it is obliged to make payment.

[17] In this case, the complaint of defects in documents and demand for refund was made by the issuing bank after the documents had been accepted and payment made to the beneficiary of the letter of credit. Assuming there were indeed defects in the documents submitted for the respondent, the release of payment was either the issuing bank's own decision to accept the defect, or alternatively, error since it could properly have refused to honour the letter of credit until all parties come to fresh agreement to resolve the problem. Be it acceptance or error, it is internal to the issuing bank and involves neither the respondent nor the appellant. It is fair and just that estoppel applies.

[18] Having accepted the documents submitted and made payment, without reservations, the issuing bank is estopped from demanding the return of the payment made on the grounds of alleged defects. The respondent is not obliged to refund to the issuing bank or the reimbursing bank whose problem would arise if, and only if the buyer refuses to pay the issuing bank, or the issuing bank disputes with its reimbursing bank. The case of *United Bank Ltd v. Banque Nationale De Paris & Ors* [1991] 3 CLJ 2012; [1991] 4 CLJ (Rep) 1137 amply illustrates the point. The parties in such an action are the issuing bank against a negotiating bank, an advising bank and the applicant for the letter of credit.

[19] For an issuing bank to be able to reverse its position after acceptance of the claim and the completion of the process of payment under a letter of credit would defeat the goals of certainty, promptness and finality of payment which letters of credit serve to provide to sellers in the context of an international trading system with minimal cross-border litigation.

Relationship Between Appellant And Respondent

[20] As admitted in the submissions for the appellant, after receiving the letter of credit, the respondent asked the appellant to assist in the letter of credit transaction. The appellant, in this case, thus acted as the respondent's bank. The fact the appellant took the respondent's documents and forwarded the documents to the issuing bank to seek payment for the respondent does not metamorphose it into a "negotiating bank". It was a bank which accepts the documents for examination and, if these are found in order, credits the due amount to the beneficiary. It has no authority

to conduct any negotiation. The learned judge went so far only to say the transaction was of a negotiating kind, but correctly did not, in light of the evidence, expressly find that the appellant was a negotiating bank, a term with a specific meaning in the law and practice relating to letters of credit. Acting on the respondent's behalf, the appellant submitted the respondent's claim for payment and received the payment. The payment was received not for its own benefit or account but for the respondent.

[21] In these circumstances, the Appellant erred in acting on its own to refund to the issuing bank and then to debit the respondent's account, without being specifically authorised to do so by the respondent. The appellant cannot make the respondent bear the burden of its own error.

Indemnity

[22] A letter of indemnity was relied upon as supporting the argument that the transaction was carried out under UCP 400 which provides for a right of recourse. The argument is unnecessary for if there is an indemnity, the appellant's recourse to the respondent is upon the indemnity and not UCP 400. However, the indemnity was suspect as to its authenticity and applicability to the transaction at hand. That is a finding of fact that does not require a plea of fraud.

[23] The respondent made a police report in which she stated that she had given the documents as well as a letter of indemnity to the appellant. Her letter of 21 August 1993 admitted signing a blank general indemnity. In the trial she maintained the letter of indemnity was for other purposes. It was submitted the trial court erred when it held the letter of indemnity suspicious because the date had been blanked over and accepted it was executed for another purpose.

[24] This issue was addressed before the learned judge. The learned judge who had the benefit of hearing the parties examine and cross-examine the witnesses thereon, was not shown to have erred in coming to a finding. The fact a party disagrees with the finding of a trial judge does not mean the judge had erred. It must be shown either the judge had made an error of law or made a finding contrary to the evidence before him. But he cannot be said to have erred if the evidence before him is not conclusive but required of him to make a finding after hearing conflicting or

differing versions put before him by the parties. An appellate court cannot interfere with the finding of a trial court in such circumstances. Simply to substitute a finding of fact merely because the appellate court came to a different conclusion not only opens the gates to court shopping but is tantamount to contempt of the trial court even if it is not a contempt of court.

Section 73 Contracts Act

[25] Reliance was also placed on s. 73 of the Contracts Act 1950 Act 136. It was submitted:

> 30. In so doing, under sec 73 of the Contracts Act 1950, the Defendant became entitled to have the sum it refunded to the Taiwanese issuing Bank (TBB). Sec 73 reads:
>
> > A person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it. ...

[26] Recovery of monies paid under a mistake under s. 73 is a matter that can be raised by the issuing bank against the respondent and appellant. The factual basis to such right has to be established by the issuing bank, which the appellant might choose not to dispute if it bears the cost itself, but is not entitled to do so without prior notice or consent of the respondent if the appellant intends to pass on the cost of it to the latter. Where it fails to do so it runs the risk of an action as in this case.

Decision

[27] Having heard submissions from the parties, this court ordered the appeal be dismissed with costs fixed in the sum of RM5,000 in this court and below, confirmed the decision of the High Court and further ordered that the deposit be paid to the respondent towards costs.

[28] These grounds have been read and approved by Justice Sulaiman Daud and Justice T. Selventhiranathan of the Court of Appeal.